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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5751 (S.C. Ct. App. Filed July 29, 2020)

THE STATE,

RESPONDENT,

V.

MICHAEL N. FRASIER

PETITIONER

APPELLATE CASE NO. 2020-001405

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael N. Frasier, Jr., Appellant.

Appellate Case No. 2017-000802

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5751
Heard October 15, 2019 – Filed July 29, 2020

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

LOCKEMY, C.J.: Michael N. Frasier, Jr. appeals his conviction for trafficking cocaine, arguing the trial court erred by refusing to suppress (1) evidence obtained from the search of a vehicle when police lacked reasonable suspicion of criminal activity to extend a traffic stop, (2) evidence found on his person as a result of an

illegal search, and (3) his statement to police taken in violation of *Missouri v. Seibert*.[1] We affirm.

FACTS

On the morning of August 14, 2013, Frasier arrived by bus at a transit station in North Charleston, where Cheryl Jones[2] was waiting to pick him up.[3] Soon after Jones and Frasier left the station, North Charleston police stopped Jones for an inoperative third brake light. During the stop, Jones consented to a search of her vehicle. Officers found a large quantity of a substance that appeared to be cocaine and a duffel bag containing men's clothing items and "Superior B"—a substance known as a "cutting agent" for cocaine—in the vehicle. Officers also searched Frasier and found a bus ticket, a straw, and a small Ziploc bag containing a white powdery substance in his pocket. Officers arrested Frasier and he was later indicted for trafficking cocaine.

At the outset of Frasier's jury trial, he moved to suppress the evidence from the vehicle and his pocket, arguing officers extended the traffic stop without reasonable suspicion and he did not consent to the search of his person. Frasier also moved to suppress his statement as involuntary. The trial court held an in camera hearing on the motions. Sergeant Daniel Pritchard of the North Charleston Police Department testified that in 2013, he worked on a task force in the narcotics division. He explained his duties included parcel interdiction, which involved "attempt[ing] to make contact with folks coming in on mass transit." Sergeant Pritchard stated that on August 14, 2013, he and another officer, Detective Ryan Johnson, were observing the bus station from an unmarked vehicle in the parking lot when they saw Frasier exit the bus station. Sergeant Pritchard testified that as he left the station, Frasier "looked left, cleared right, and then proceeded to a vehicle directly in front of the door, entered [the vehicle], and they left." He explained Frasier appeared to be "clearing the area for threats" such as "law enforcement, enemies, something of the sort" and seemed "uncomfortable." Sergeant Pritchard stated Frasier's "scanning" of the parking lot seemed suspicious

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[1] 542 U.S. 600, 604-12 (2004) (plurality opinion) (holding a postwarning statement was inadmissible when police used a "question first and warn later" tactic, reasoning that "th[e] midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with [the] constitutional requirement[s]" of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

[2] During trial, Jones testified Frasier was her common-law husband.

[3] A toddler was in the backseat of the car.

because the vehicle he entered was "directly in front of the door," yet he looked "at the whole parking lot, left and right." He stated he and Officer Johnson followed in an unmarked vehicle, "were able to get a violation on the vehicle" because the third brake light was out, and contacted patrol to request a traffic stop.

Officer Steve Hall testified he was employed with the North Charleston Police Department for eleven years, consisting of four years of patrol, four years of narcotics, and four years in backup patrol. He stated he conducted "at least 1,000" traffic stops and was familiar with how people reacted to traffic stops. Officer Hall testified he pulled Jones's vehicle over at approximately 8:00 a.m. on August 14, 2013. He recalled that either Sergeant Pritchard or Officer Johnson contacted him and asked him to initiate a traffic stop of the vehicle. Officer Hall testified that when he initiated the stop, he knew the other officers had observed Frasier at the bus stop and they believed there was "something suspicious" about him. He explained that when he first got behind Jones's vehicle, she "made several lane changes, almost in an attempt to evade [him]" and it took her "a few hundred yards" to pull over after he activated his blue lights.[4] Officer Hall explained that when he approached the vehicle, he noticed Jones's pants zipper was "pulled all the way down" and in his experience, people sometimes tried to hide narcotics in "their pants or crotch area." He acknowledged that after Jones got out of the vehicle, he asked her why her pants were unzipped and she said she had just gotten out of the shower and left quickly to go to the bus station.

Officer Hall stated Frasier seemed "nervous" because he was sweating profusely and avoided eye contact with him. He noted the outside temperature was about seventy-five or eighty degrees at the time. Officer Hall averred that based on his experience, Frasier's nervousness appeared "a little more elevated" than a "normal traffic stop." He stated he asked Jones and Frasier where they were coming from several times but they never gave him a clear answer and he felt they "were being evasive." Officer Hall explained that "with the totality of everything," including what the detectives told him, as well as Jones's delay in pulling over, her unzipped pants, and Jones and Frasier failing to directly answer his questions, "[his] interest was piqued highly that something was amiss." He agreed, based on his experience in narcotics, that it was "common for people who traffic and deal with narcotics to utilize the mass transit and bus system" to bring drugs into the community, and this was another "significant factor" that "piqu[ed]" his interest. Officer Hall also recalled Jones opening her car door when he was writing the ticket, which he

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[4] Officer Hall's dashboard camera captured the stop and the remainder of the encounter with Jones and Frasier.

thought "seemed a little odd" because he did not "know why someone would try to get out" and did not "see [that] very often."

After writing Jones a warning ticket for the brake light but before giving it to her, Officer Hall asked her to exit the vehicle. He then asked Jones for consent to search the vehicle, which she provided, and one of the officers asked Frasier to exit the vehicle as well. Officer Hall asked Frasier "if he minded if [he] checked him out or searched him," and Frasier stated, "I do, but," and then turned around and put his hands on top of the vehicle. Officer Hall interpreted this as meaning, "I do mind, but proceed [with the search]." He then searched Frasier and found a "small plastic Ziploc bag[] of white powder substance" in his pocket and placed him under arrest. Officer Hall stated he did not read Frasier his *Miranda*[5] rights immediately because when he began to place Frasier in handcuffs, Frasier "kind of tensed . . . or flexed up" and Officer Hall "threw [his] attention towards that." He explained reading a person his *Miranda* rights "can add to the tension" and he was "trying to de-escalate" the situation.

Thereafter, the officers searched the vehicle and found what appeared to be a large quantity of cocaine in a jacket pocket in the backseat. As shown in the video from the dashboard camera, Officer Hall, after reaching into the back seat of the vehicle, stood up and asked, "[W]hose jacket?" while holding the jacket over his head. Frasier then claimed ownership of the jacket. Remaining where he stood, Officer Hall then asked, "[T]hat's your jacket? Do you know what's in your jacket? What would be in your jacket?" Officer Hall continued questioning Frasier for a few more seconds, but he did not respond. Frasier and Jones were both in handcuffs at the time.

Officers then placed Frasier in the back of a police cruiser. Officer Hall stated that he then read Frasier his *Miranda* rights and this took place about twenty-eight minutes after the arrest. He testified Frasier did not appear to be intoxicated, was able to communicate with him, and seemed to understand his rights. Officer Hall denied engaging in a tactic of delaying reading Frasier his *Miranda* warnings to elicit an incriminating response. He stated he again asked Frasier about the jacket

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[5] *Miranda*, 384 U.S. at 479 (holding that in order for a statement given by a defendant during custodial interrogation to be admissible, the record must show law enforcement advised him of his right to remain silent and his right to counsel and gave him the "[o]pportunity to exercise these rights . . . throughout the interrogation" and after being so advised, he "knowingly and intelligently waive[d] these rights and agree[d] to answer questions or make a statement").

and he gave the same answer. Officer Hall denied threatening Frasier, promising him leniency, or threatening to arrest Jones if he did not admit the drugs were his.

On cross-examination, Officer Hall explained he did not "stop to try to clarify what [Frasier] meant" when he stated "I do, but" because Officer Hall did not believe anyone ever "want[ed] to be searched," and he, too, "would mind if someone wanted to search [him]." Officer Hall explained that after Frasier stated, "I do, but," Frasier "turn[ed] around and, if you will, assume[d] the position like he was okay with it." He agreed Frasier asked, "My pockets too?" but never said "stop" or "stop doing that." Officer Hall acknowledged he was about six-feet tall and weighed about 200 pounds, the other responding officer had a similar build, and both were armed with pistols, stun guns, pepper spray, and batons during the stop.

Officer Hall acknowledged that when he asked about the jacket, Jones had just been placed in handcuffs. He explained that after Frasier stated, "They don't have nothing to do with it," Officer Hall stated, "She's just be[ing] detained right now. I am not saying she's under arrest." Frasier asked if this implied that if he claimed the drugs, she would not be arrested; Officer Hall responded, "Right, pending further investigation." He agreed that after Frasier claimed the jacket, the officers released Jones and the child. Officer Hall conceded that after he read Frasier his *Miranda* rights he resumed questioning by asking, "[Y]ou are telling me the jacket is yours," which was a continuation of the questions he asked about eight minutes earlier. He acknowledged he told Frasier that if he "sp[oke] up," he "c[ould] get people there . . . who c[ould] help him." Officer Hall explained he was not trying to convince Frasier to "admit the drugs were his"; instead, he meant that Frasier "could potentially work off these charges and help himself."

The State argued the officers lawfully extended the traffic stop and contended the following facts created a reasonable suspicion under the totality of the circumstances: (1) officers observed Frasier "scanning" the bus station parking lot before entering a vehicle parked close to the door, (2) Jones's pants were unzipped, (3) Frasier behaved nervously, (4) Jones and Frasier failed to directly answer the officer's questions, (5) Jones delayed in stopping her vehicle, and (6) Jones opened her car door during the traffic stop. The State conceded whether Frasier consented to the search of his person was a "close call" but argued the officer believed Frasier consented based upon the interaction.[6]

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[6] The parties agreed the search of Frasier's person was not a "*Terry* frisk." *See Terry v. Ohio*, 392 U.S. 1 (1968) (holding that under certain circumstances, an

Frasier argued the officers unlawfully extended the traffic stop because the purpose of the stop had already concluded when the officer asked Jones to exit the vehicle. He asserted the officers had no reasonable suspicion to detain them after that point. Frasier argued that regardless of what his body language indicated, when officers searched him he thought he "d[id]n't have a choice" because "they [we]re going to search [him] anyway." The court responded,

> I don't know what was in his mind. I can only judge objectively what I see on the video. [Frasier] didn't testify. Nobody can speculate what [his] state of mind was. I can only judge the reasonable unambiguous meaning of his words and his body language. And he doesn't have to testify. He doesn't have any burden of proof. But I cannot base a decision on what I speculate to be his state of mind. I can only look at a video and tell me [sic] what it says.

Frasier argued the officers did not ask if they could search him but rather they asserted, "You don't mind if [we] check you real quick." He argued he submitted to the officers' authority but did not voluntarily consent, and even if he consented, he revoked his consent by protesting when officers began to search his pockets.

The State conceded Frasier's prewarning statements were inadmissible. Frasier argued that pursuant to *Seibert*, the court should exclude his postwarning statements as well. He also argued that under *State v. Corns*,[7] the statements were involuntary because he made them in response to the officer's implication that he would arrest Jones if Frasier did not claim the drugs.

After briefly taking the matter under advisement, the trial court ruled all of Frasier's post-*Miranda* statements were admissible. The trial court distinguished the officer's first questioning from the postwarning questioning, stating that once Frasier was placed in the back of the cruiser, "any questioning of him was designed

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officer may "conduct a carefully limited search of [a person's] outer clothing . . . in an attempt to discover weapons [that] might be used to assault him").

[7] 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992) (finding officers' testimony that they told the defendant his wife could be arrested and their children could be taken from them amounted to improper influence rendering his statement involuntary).

to inculpate him." The trial court noted Frasier had previous interactions with law enforcement and therefore had sufficient education and awareness to understand his *Miranda* rights and know he did not have to answer.[8] The trial court reasoned officers had not used *Miranda* "[to] clean up an inappropriate interrogation" but instead had directed their first question to both Frasier and Jones, and that question could have inculpated either of them. The court stated that although it would have been prudent to "*Mirandize*" Frasier immediately upon arrest, the officer testified Frasier "flexed" when he handcuffed him and he felt that if he administered *Miranda* warnings at that time it might have escalated tensions. The court found Officer Hall "credible, that in hindsight, he thought it would have been better" to read *Miranda* warnings immediately. The trial court stated that according to the video, Frasier appeared to be oriented as to time and place and nothing indicated he was under the influence of any substances or did not understand the warnings. In addition, the trial court rejected Frasier's argument that he claimed the jacket because he felt threatened officers would arrest Jones.

The trial court next found Frasier consented to the search of his person. The court determined that according to the video, notwithstanding Frasier's verbal comments, "his body language [wa]s clearly consensual" and he "very clearly, by his behavior, in a noncoerced way, turn[ed] and put[] his hands on the car and consent[ed] to his person being searched." The trial court noted the officer did not put his hands on Frasier in any way and his tone was not threatening but was "very moderate." In addition, the court reasoned that regardless of what Frasier's inner thoughts might have been, it could not "speculate about what was in someone's consciousness when they did what they did." The trial court noted that when he said, "[E]ven my pockets too?" he could have said, "I don't want you in my pockets" but did not.

Next, although the trial court acknowledged it was "at best a 50/50 call," it concluded officers had an objectively reasonable and articulable suspicion to extend the stop beyond its initial purpose based upon the totality of the circumstances. The trial court noted it had to consider the officers' subjective opinions about what they perceived in determining whether, from an objective standpoint under the totality of the circumstances, there was reasonable suspicion. The court found the officers "articulated many factors" and "what they believed to be the basis of a reasonable and articulable suspicion to extend the stop," and it concluded such "testimony [wa]s reasonable and supported by the facts." The trial court found Sergeant Pritchard's observations of Frasier at the bus station were part

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[8] The State noted Frasier had several prior drug-related charges on his record and was convicted of a drug offense in 1999 that was reversed on appeal.

of the totality of the circumstances. However, the court declined to include Jones's purported delay in pulling over as part of its analysis, finding this delay was reasonable under the circumstances.[9] In addition, the trial court concluded the officer's testimony about what he "perceived objectively based on his experience and training" was credible and amounted to a reasonable articulable suspicion. The trial court reached these conclusions after reviewing the complete video of the traffic stop, hearing the testimony of the officers, and engaging in an extensive exchange with counsel. Finally, the court concluded that because there was reasonable suspicion to extend the stop, Jones's consent to search the vehicle was valid, and all evidence obtained from that search was admissible.

During trial, Sergeant Pritchard and Officer Hall testified consistently with their pretrial testimony. The State also called Jones as a witness. Jones denied giving consent to search her vehicle; however, the State impeached her by playing the video, which showed her consenting to the search. Frasier timely renewed all objections contemporaneously with the admission of the evidence, and the trial court admitted the evidence over his objections. The jury found Frasier guilty of trafficking cocaine, and the trial court sentenced him to twenty-five years' imprisonment. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err by refusing to suppress evidence obtained from the search of Jones's vehicle?

2. Did the trial court err by refusing to suppress evidence obtained from the search of Frasier's person?

3. Did the trial court err by refusing to suppress Frasier's postwarning statements in violation of the rule established in *Missouri v. Seibert*?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "On appeals from a motion to suppress based on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse if there is clear error." *State v. Tindall*, 388

[9] Because the trial court declined to consider Jones's delay as a factor, we likewise exclude this in determining whether the evidence supports the court's ruling.

S.C. 518, 521, 698 S.E.2d 203, 205 (2010). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (quoting *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). "Rather, appellate courts must affirm if there is any evidence to support the trial court's ruling." *Id.* (quoting *State v. Provet*, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013)). "However, this deference does not bar this [c]ourt from conducting its own review of the record to determine whether the trial [court]'s decision is supported by the evidence." *Tindall*, 388 S.C. at 521, 698 S.E.2d at 205.

"On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). "When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

LAW/ANALYSIS

I. Extension of Traffic Stop

Frasier argues the trial court's ruling constituted clear error because the record did not support its finding that law enforcement had a reasonable articulable suspicion to justify the extended traffic stop and detention.[10] He asserts the "purported vague suspicious" behavior the officers observed at the bus station, Jones's delay in stopping and her unzipped pants, the opening of the driver's side door, and Frasier's nervousness did not give rise to an objectively reasonable and articulable suspicion that illegal activity was occurring. Frasier contends any purported consent he or Jones provided was "obtained through Officer Hall's exploitation of the unlawful detention" and therefore ineffective. We disagree.

The question before this court is whether there is "any evidence to support the trial court's finding of reasonable suspicion—not [our own] . . . independent view of the facts." *Moore*, 415 S.C. at 253, 781 S.E.2d at 901; *see also Provet*, 405 S.C. at 107, 747 S.E.2d at 456 ("South Carolina appellate courts review Fourth

[10] Frasier does not challenge the initial stop on appeal.

Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court's ruling." (citation omitted)).

"A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." *Tindall*, 388 S.C. at 521, 698 S.E.2d at 205. "Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime." *Id.*

"The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." *Pichardo*, 367 S.C. at 104, 623 S.E.2d at 851. "[C]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." *Moore*, 415 S.C. at 252-53, 781 S.E.2d at 901 (alteration in original) (quoting *State v. Taylor*, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2013)). "In determining whether reasonable suspicion exists, the whole picture must be considered." *Pichardo*, 367 S.C. at 104, 623 S.E.2d at 851; *see also United States v. Sokolow*, 490 U.S. 1, 8 (1989) ("In evaluating the validity of a stop such as this, we must consider 'the totality of the circumstances—the whole picture.'" (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981))). "The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant." *Moore*, 415 S.C. at 252, 781 S.E.2d at 901 (quoting *Provet*, 405 S.C. at 108, 747 S.E.2d at 457).

Because we must evaluate the trial court's findings for clear error, we reluctantly conclude evidence supported the trial court's finding the officer had reasonable suspicion to extend the stop. *See Moore*, 415 S.C. at 251, 781 S.E.2d at 900 ("The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." (quoting *Pichardo*, 367 S.C. at 96, 623 S.E.2d at 846)); *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court]'s ruling is supported by any evidence."). Here, Officer Hall testified that he had four years of experience in narcotics, had four years of patrol experience, and had conducted at least 1,000 traffic stops. He stated that at the time he initiated the stop, he knew Frasier had come from the bus station and narcotics officers had noticed something suspicious about him. Officer Hall testified that in his

experience, people commonly used the bus system to bring narcotics into the community. He explained that when he first approached Jones's vehicle, her pants were fully unzipped and in his experience, people sometimes hid narcotics in their crotch area. Additionally, Officer Hall averred Frasier's level of nervousness was "a little more elevated" than what he normally saw during a traffic stop. Further, he stated Jones and Frasier evaded his questions about where they were coming from. Finally, he stated Jones's opening the driver's side door struck him as "a little odd" because it was an uncommon occurrence during traffic stops. Officer Hall stated that based on these observations, his "interest was piqued highly that something was amiss."

Although we acknowledge that several of these factors would likely be insufficient standing alone to support a finding of reasonable suspicion, they must be viewed under the totality of the circumstances. *See Moore*, 415 S.C. at 253, 781 S.E.2d at 901 (acknowledging "many of the factors offered by the State seem innocent when viewed in isolation," but finding there was "evidence to support the trial court's finding of reasonable suspicion to prolong the traffic stop given the totality of the surrounding circumstances"); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (recognizing that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). Officer Hall's testimony linked the foregoing observations to the knowledge he gained from his experience in law enforcement to explain why Jones's and Frasier's behaviors caused him concern. Therefore, in view of the totality of the circumstances, we find Officer Hall's testimony supports the trial court's finding that the decision to further detain Jones and Frasier was based on reasonable articulable suspicion. *See Pichardo*, 367 S.C. at 104, 623 S.E.2d at 851 (noting that reasonable suspicion "requires a particularized and objective basis that would lead one to suspect another of criminal activity"); *Moore*, 415 S.C. at 252-53, 781 S.E.2d at 901 ("[C]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." (alteration in original) (quoting *Taylor*, 401 S.C. at 113, 736 S.E.2d at 667)). We find the trial court applied the correct legal analysis and evidence in the record supports its findings. We therefore affirm the trial court's refusal to suppress the evidence obtained from the search of the vehicle.

II. Search of Frasier's Person

Frasier argues the trial court erred by finding he gave officers consent to search his person because his "begrudging submission" to their request was not consent. He asserts he demonstrated non-consent by stating, "I do, but" when the officer asked him if he minded if the officer searched him and he merely submitted to the search

when he placed his hands on the vehicle. Frasier contends he was surrounded by two armed and uniformed officers, was not informed of his right to decline the search, and did not feel free to leave. We disagree.

"Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). "The existence of consent is determined from the totality of the circumstances." *Id.* "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the 'totality of the circumstances.'" *State v. Wallace*, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977). "The burden is on the State to show voluntariness." *Id.* Although "the subject's knowledge of a right to refuse is a factor to be taken into account, the [State] is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

"Conduct falling short of 'an unequivocal act or statement of withdrawal' is not sufficiently indicative of an intent to withdraw consent." *State v. Mattison*, 352 S.C. 577, 587, 575 S.E.2d 852, 857 (Ct. App. 2003) (quoting *United States v. Alfaro*, 935 F.2d 64, 67 (5th Cir. 1991)). "Effective withdrawal of a consent to search requires unequivocal conduct, in the form of either an act, statement or [a] combination of the two, that is inconsistent with consent previously given." *Id.*

We find evidence supports the trial court's finding that Frasier consented to the search of his person. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court']s ruling is supported by any evidence."). Here, Frasier can be seen and heard in the video stating, "I do, but" when the officer asked if he minded if he "checked" him and then he turned around and placed his hands on top of the vehicle. When the officer began to search his pockets, Frasier stated, "my pockets too?" but did not tell the officers to stop or otherwise revoke his consent. Additionally, Officer Hall testified that even though Frasier said he "mind[ed]," he then turned around and placed his hands on the vehicle, which Officer Hall perceived as permission. Further, he stated Frasier never said "stop" or "stop doing that." Finally, the record contains no evidence officers used or threatened the use of force to coerce Frasier to consent. The trial court found that according to the video, notwithstanding Frasier's statements, "his body language [wa]s clearly consensual" and he "very clearly, by his behavior, in a noncoerced way, turn[ed] and put[] his hands on the vehicle and consent[ed]" to the search. The trial court stated it could not speculate as to Frasier's inner

thoughts but found he did not revoke his consent by stating "even my pockets too?" because this was not an unequivocal act or statement revoking consent. We find Frasier's conduct depicted in the video as well as Officer Hall's testimony support a conclusion that, by Frasier's words and conduct, he voluntarily consented to the search and did not effectively withdraw that consent at any point during the search. Accordingly, we find the trial court did not err by concluding Frasier consented to the search, and we affirm its denial of his motion to suppress.

III. Voluntariness of Frasier's Statement

Frasier argues the trial court erred by refusing to suppress his statement claiming ownership of the jacket found in the vehicle as involuntary and in violation of *Seibert*. He asserts that although the officer's initial questioning about the ownership of the jacket was not lengthy, the same officer conducted the second, post-*Miranda* questioning, which occurred only eight minutes later. Additionally, Frasier contends his statement was involuntary because he made it after law enforcement's veiled threat to arrest Jones. We disagree.

"On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." *State v. Kennedy*, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). "The State bears the burden of proving by a preponderance of the evidence that a defendant's rights were voluntarily waived after being advised of his *Miranda* rights." *State v. Osborne*, 301 S.C. 363, 365, 392 S.E.2d 178, 179 (1990). "Interrogation is the express questioning, or its functional equivalent[,] which includes 'words or actions on the part of the police . . . that the police should know *are reasonably likely to elicit an incriminating response.*" *Kennedy*, 333 S.C. at 431, 510 S.E.2d at 716 (second alteration in original) (quoting *State v. Sims*, 304 S.C. 409, 417, 405 S.E.2d 377, 381 (1991)).

"The purpose of *Miranda* warnings is to apprise a defendant of the constitutional privilege not to incriminate oneself while in the custody of law enforcement." *State v. Medley*, 417 S.C. 18, 24, 787 S.E.2d 847, 850 (Ct. App. 2016). In *Seibert*, the Unites States Supreme Court considered the admissibility of a repeated statement elicited pursuant to a police practice of "question first, warn later." 542 U.S. at 604-06 (plurality opinion). The Court identified "relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object." *Id.* at 615. These facts consist of the following:

> [T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. Discussing the case of *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court noted that when unwarned questioning took place during a short conversation at the suspect's home followed by delivery of *Miranda* warnings to the suspect at the police station, "a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience." *Seibert*, 542 U.S. at 615. The Court opined that under such circumstances, "the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.* at 615-16.

We find Officer Hall's testimony and the contents of the video support the trial court's finding that, based on the totality of the circumstances, Frasier's postwarning statement, in which he admitted to owning the jacket, was voluntary notwithstanding Officer Hall's pre-warning questioning. *See Rochester*, 301 S.C. at 200, 391 S.E.2d at 247 ("On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion.").

First, as to the completeness and detail of the questions and answers during the first round of interrogation, the question asked was, "Whose jacket?", and Frasier admitted it was his. Although Officer Hall continued to question Frasier for a few more seconds about what was in the jacket, Frasier did not respond. We find the foregoing supports the trial court's finding that Officer Hall directed his initial question to both Jones and Frasier and it could have incriminated either. Second, as to the timing and setting of the first and second round of questioning, the trial court concluded the first and second round of questioning was distinct and found that once the officers had placed Frasier in the vehicle, "any questioning of him was designed to . . . incriminate him." Additionally, the trial court noted Frasier had previous "contact with the system" and had sufficient knowledge and education to know that he had the right to remain silent. We find the evidence supports the trial court's finding that the timing and setting of the two rounds of questioning were sufficiently different for Frasier to appreciate that the second round of questioning was a new and distinct experience. Here, the initial

questioning was informal and occurred while Frasier was standing next to the police cruiser and Officer Hall was several yards away. The postwarning questioning was more formal and took place after officers had placed Frasier in the back of the police cruiser, and Officer Hall sat in the front of the cruiser. In addition, there was a break of several minutes between the first and second round. Officer Hall denied engaging in any tactic of delaying reading Frasier his *Miranda* warnings in order to elicit an incriminating response and denied threatening Frasier or promising him leniency or threatening to arrest Jones if Frasier did not claim the drugs. We find the foregoing supports the trial court's finding the timing and setting of the two rounds of questioning weigh in favor of admissibility.

Finally, as to the second and fourth *Seibert* factors, we acknowledge the same officer questioned Frasier both before and after he received his *Miranda* warnings and Frasier's statements contained overlapping content. Nevertheless, we find the foregoing evidence supports the trial court's conclusion that Frasier's postwarning statements were voluntary and admissible. *See Saltz*, 346 S.C. at 136, 551 S.E.2d at 252 ("When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence.").

Further, we find evidence supports the trial court's rejection of Frasier's argument he claimed ownership of the jacket because he felt threatened officers would arrest Jones. Although the burden was upon the State to prove voluntariness, Frasier provided no testimony he felt coerced or threatened by the fact officers had placed Jones in handcuffs. The video recording shows Officer Hall made no express threat to arrest Jones if Frasier did not confess. Therefore, the trial court did not err by refusing to exclude the statement on this basis.

CONCLUSION

For the foregoing reasons, we find the trial court did not err by concluding officers lawfully extended the traffic stop, Frasier consented to the search of his person, and his statement was voluntary. We therefore affirm the trial court's denial of Frasier's motions to suppress. Accordingly, Frasier's conviction is

AFFIRMED.

KONDUROS and HILL, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MICHAEL N. FRASIER, JR.,

APPELLANT

APPELLATE CASE NO 2017-000802

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5751

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Michael N. Frasier, Jr. petitions the Court for rehearing and respectfully submits that this Court overlooked the fact the evidence relied upon by this Court to support the trial judge's finding that the officer had a reasonable articulable suspicion to justify the extended traffic stop and further detention does not meet the threshold minimum to justify the extended stop. Under a clear error standard of review this Court should conduct its own review of the record and determine that the trial judge's finding that the officer had a reasonable articulable suspicion to justify the extended traffic stop and further detention is not supported by the evidence, especially in light of the fact that the trial judge failed to make any specific findings of

fact to support the ruling. This Court found that the officer's experience, the fact that narcotics officers noticed "something suspicious" about Petitioner at the bus station, the use of the bus system, the driver's unzipped pants, a "little more elevated" nervousness, evasiveness in answering questions about where they were coming from and the driver door opening during the stop support the trial judge's finding. Respectfully, these factors do not rise to the level of reasonable articulable suspicion that illegal activity had occurred or was occurring. The trial judge's general finding is not supported by the record.

Additionally, counsel respectfully submits that this Court and the trial judge overlooked the totality of the circumstances in determining that the consent to search was voluntary. Under a clear error standard of review based on the totality of the circumstances, this Court should conduct its own review of the record and determine that the trial judge's finding that that the consent to search was voluntary is not supported by the record.

Finally, counsel respectfully submits that this Court, in finding that Petitioner's post-*Miranda* warning statement that the jacket containing drugs belonged to him was voluntarily made, overlooked the fact that Petitioner was not warned that his pre-*Miranda* warning statement could not be used against him. Additionally, counsel respectfully submits that this Court shifted the burden of proof in finding that Petitioner provided no testimony he felt coerced or threatened by the fact that, prior to Petitioner making the statement, officers placed his common law wife in handcuffs in the presence of a toddler. The failure to suppress the post-*Miranda* statement constituted an abuse of discretion. Petitioner respectfully seeks rehearing on all three issues presented.

FACTS

On the morning of August 14, 2013, narcotics officers with the North Charleston Police Department saw Petitioner leave the bus station in North Charleston, get into a car and leave. (R. p. 28, lines 9-19). During the pre-trial hearing on Petitioner's motion to suppress Officer Pritchard testified, "It appeared to me that he was clearing the area for threats, i.e., whether it be law enforcement, enemies, something of the sort. He was uncomfortable, it appeared to me." (R. p. 28, line 24 – p. 29, lines 1-2). Based on this purported suspicious behavior, the officers followed the car in which Petitioner was a passenger. Officer Pritchard testified, "Commonly, this happened multiples where we had to get the vehicle stopped leaving certain areas due to the fact that we have no lights. And we've had to – it's easier for us to follow in an unmarked vehicle where we can get a violation. On this particular date, we did follow the vehicle and were able to get a violation on the vehicle, which was a third brake light." (R. p. 30, lines 12-19). After the narcotics officers "got a violation" they contacted a patrol officer to stop the car for the brake light violation. (R. p. 37, lines 1-12).

Officer Hall, the patrol officer who was contacted by the narcotics officers, stopped the car. Cheryl Jones was the driver, Petitioner was a passenger in the front seat and there was a child in the backseat. (R. p. 172, lines 16-21; p. 48, line 23 – p. 49, lines 1-2). Once Officer Hall determined that Ms. Jones had a valid driver's license and neither Jones nor Petitioner had outstanding warrants, the officer decided to write a warning ticket and "try to get consent." (R. p. 64, lines 20-23). Another officer, Officer Deaton, provided backup at the traffic stop. (R. p. 174, lines 10-18). According to Officer Hall, Ms. Jones gave consent to search the car. (R. p. 66, lines 18-19). The officers asked both Ms. Jones and Petitioner to step out of the car.

Officer Hall testified that he asked Petitioner "if he minded if I checked him out or searched him, and he said, 'I do, but', and just kind of put his hands on top of the car." (R. p. 46, lines 23-25). Officer Hall searched Petitioner and found a small bag containing cocaine, a straw and a bus ticket. (R. p. 232, lines 1-3; p. 237, line 11 – p. 238, 239, 240 lines 1-2). At this point Officer Hall arrested Petitioner. (R. p. 47, lines 16-20). Officer Hall and another officer searched the car and found more cocaine in a jacket in the backseat. (R. p. 48, lines 12-22). The officers also found Superior B, a substance used to cut cocaine, in a bag in the backseat. (R. p. 77, lines 13-15).

Prior to *Miranda* warnings, Officer Hall questioned Petitioner about the jacket where the cocaine was found. (R. p. 49, lines 12-19). Officer Hall testified that Petitioner stated that the jacket was his. (R. p. 49, lines 20-21). Eight minutes later, Officer Hall advised Petitioner of his *Miranda* rights. (R. p. 76, lines 7-11). Officer Hall again asked Petitioner about the jacket found in the car. (R. p. 76, lines 15-19) Officer Pritchard, one of the narcotics officers who arrived at the stop later, also asked Petitioner, post *Miranda* warnings, about the cocaine found in the jacket in the car. According to the officer, Petitioner responded, "I'm responsible." (R. p. 159, lines 19-21). Ms. Jones was given a warning ticket for the inoperable third brake light but was not arrested or charged with any drug offense.

ARGUMENTS

1. **The trial judge erred in refusing to suppress evidence obtained when the police unlawfully seized Petitioner, a passenger in a car stopped for having an inoperable third brake light, by exceeding the scope of the initial traffic stop and lacking a reasonable suspicion of criminal activity to support the extension of the stop.**

Prior to trial Petitioner filed a written motion to suppress and moved to suppress all evidence, including a small amount of cocaine, a straw and a bus ticket found on Petitioner's person, cocaine found in the car, cutting agent found in the car, the dash cam video of the traffic stop and statements of the Petitioner, obtained as a result of an illegal seizure in violation of the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. (R. pp. 91-125; R. p. 350- 355). The trial judge denied the motion finding that the police had reasonable suspicion of criminal activity to justify the extension of the initial traffic stop. (R. pp. 109-135). The trial judge erred. The State failed to establish that the police officers had reasonable suspicion to prolong the traffic stop. There is no evidence to support the trial judge's finding of reasonable suspicion.

Narcotics officers with the North Charleston Police Department ordered a traffic stop of the car in which Petitioner left the bus station as a passenger based on the fact that Petitioner scanned the parking lot as he left the bus station. (R. p. 35, line 6 – p. 36, 37, lines 1-12). The inoperable third brake light violation was a mere pretext for the stop. As the trial judge stated, "We know that they called to have him stopped because they saw his behavior at the bus station. They felt it was suspicious, and that they were just looking for a reason to stop the car so that they could search him and find out if there were illegal drugs in the car." (R. p. 92, lines 12-17). When Officer Hall, the patrol officer called to make the traffic stop, was asked what information he received form the narcotics officers, Officer Hall testified, "I was told that they had – they

were watching the bus station and observed the subject exit the bus station, enter a car. They didn't give me – run through all the particulars. They just believed that something was funny about it and asked if I would conduct a traffic stop on the vehicle." (R. p. 55, lines 1-6). A video of the traffic stop was introduced in evidence and marked as State's Exhibit #6. The video reflects that Officer Hall reached a speed of up to 87 miles per hour in order to catch up with the car. (R. p. 56, lines 7-14).

At 8:07 AM Officer Hall initiated his blue lights while the car was on the Cosgrove Bridge where the driver, Cheryl Jones, could not immediately pull over. (R. p. 56, line 18 – p. 57, line 1; p. 81, lines 10-11). Within forty-nine seconds of the initiation of the blue light Ms. Jones pulled over. (R. p. 58, lines 15-18). When the officer approached the car he noticed that Ms. Jones' zipper was down and her pants were "kind of undone." (R. p. 41, lines 9-12). Jones told the officer that she had just gotten out of the shower before coming to the bus station and she must have forgotten to zip her pants. (R. p. 63, lines 1-12). As noted by the trial judge in discussing Ms. Jones' attitude, "And you can see her attitude to the video. Like, I just got out of the shower, why is it your business that my zipper is down, which I don't know is necessarily unreasonable." (R. p. 96, line 23 – p. 97, line 1).

The officer testified that Petitioner, the passenger, appeared to be nervous. "He was sweating profusely, did not want to really interact with me a whole lot as far as eye contact, something like that." (R. p. 43, lines 3-5). As noted by the trial judge, "Everybody sweats profusely in August in Charleston." (R. p. 82, line 25 – p. 83, line 1). The video of the traffic stop shows an officer wiping his brow. Complaints about the heat and concerns about getting Ms. Jones and the child out of the heat can also be heard on the tape. (R. p. 61, line 6 – p. 62, lines 1-22).

At 8:11 AM Officer Hall ran a driver's license check. (R. p. 81, lines 11-12). The information checks on both Ms. Jones and Petitioner came back clear at 8:13 AM. (R. p. 64, lines 2-19). At this point Officer Hall decided to issue a warning ticket for the inoperable third brake light and to "try and obtain consent to search." (R. p. 64, lines 20-24). The officer testified that while he was writing the warning ticket, the driver's side door opened. (R. p. 73, lines 22-25).

Instead of giving Ms. Jones the warning ticket, Officer Hall asked her to step out of the car. After a few questions Officer Hall stated, "You don't mind if I take a quick look do you?" Jones responded, "No." (See State's Exhibit #6, video of traffic stop). The following questioning of Officer Hall took place during the suppression hearing:

> Q. So doesn't look like you actually gave her the ticket at that point?
>
> A. No.
>
> Q. But you have the ticket written out and ready to give to her, right?
>
> A. Yes, sir.
>
> Q. At that point, you are basically done with the traffic part of it, right? You are still concerned about there may be something in the car.
>
> A. Correct.
>
> Q. But the traffic portion of it, you've written the ticket out. And instead of giving it to her, you get her out and start talking to her about whether you can search the car?
>
> A. Yes, sir.

(R. p. 66, lines 3-17). At this point, the purpose of the initial traffic stop for an inoperable third brake light had ended. According to the officer, Jones then gave consent to search the car. (R. p. 66, lines 18-19). The prosecutor asserted that consent was given at 8:19 AM. (R. p. 81, lines 13-

15). When asked how long a typical traffic stop lasts Officer Hall testified, "Ten minutes, fifteen minutes maybe. I would say ten probably." (R. p. 55, lines 22-25).

Officer Hall did not have a basis to suspect that there were drugs in the car. The officer testified at the pretrial hearing, "Just with the totality of everything, with what I was relayed from the detectives and almost evasiveness – well, not evasiveness, but the length they pulled over, her zipper being undone, just not being very direct with their answers with me, my interested was piqued highly that something was amiss or – I don't know." (R. p. 45, lines 2-7). The officer admitted, however, that neither Jones nor the Petitioner provided false or conflicting statements. (R. p. 59, lines 8-23). Officer Hall agreed that within the first two minutes of the stop Petitioner told the officer he was coming from New York and Jones told the officer she was coming from the bus station. (R. p. 59, lines 8-15).

The prosecutor told the judge, "This traffic stop was extended based on a reasonable articulable suspicion." (R. p. 81, lines 20-21). The prosecutor argued that Petitioner's scanning the parking lot at the bus stop, the fact that the driver's pants were unzipped, Petitioner's nervous behavior and inability to answer questions directly, the driver's delay in stopping and opening the door during the traffic stop amounted to reasonable suspicion to justify the extended traffic stop. (R. p. 85, lines 6-18).

Petitioner, citing State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), moved to suppress the evidence found on Petitioner's person and the evidence found in the car. (R. p. 91, lines 7-19). Petitioner argued that any purported consent to search was invalid because it was the product of the illegal prolonged detention. (R. p. 93, lines 10-24; p. 101, lines 3-14). Petitioner argued that the officer did not have reasonable suspicion to prolong the traffic stop. (R. p. 97, lines 4-9; p. 100, line 8 – p. 102, lines 1-2).

The trial judge, without discussing what particular factors constituted reasonable articulable suspicion, found that the officer had an objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring. (R. pp. 131-135). The trial judge appears to acknowledge that the determination of whether the State presented evidence of reasonable suspicion to justify the extended traffic stop was a close call stating, "The next, and I've shared this with counsel, the next issue is the stop, which really is at best a 50/50 call based on the facts as they have been presented in the testimony." (R. p. 131, lines 9-12). The judge went on to state, "And I think the parties would agree that the initial purpose of the stop was the taillight[1] being out, that clearly the purpose of that stop had been concluded. And then there was a second extension of the stop." (R. p. 132, lines 13-16). The judge then discussed the narcotics officer's observation of alleged suspicious behavior at the bus stop. (R. p. 132, line 17 – p. 133, lines 1-18). The trial judge acknowledged that the patrol officer was justified in questioning Jones and the Petitioner during the traffic stop. (R. p. 133, lines 19-22). The trial judge acknowledged that nervousness alone is not enough to justify extending a traffic stop. (R. p. 133, line 23 – p. 134, line 1). The judge then stated:

> Now, the officers have articulated many factors. And just in the interest of time, because the jury now has been waiting since 1:30 on us and it's now 2:12. It's not their fault. It took us a little bit longer. And I needed to give you all a reasonable chance to eat as well before we proceeded with the trial. But in the interest of time, I'm just going to cut to the chase on it, which is that the officers articulated what they believed to be the basis of a reasonable and articulable suspicion to extend the stop. And I find that testimony is reasonable and supported by the facts.

(R. p. 134, lines 14-24). The trial judge found that the purported delay in stopping, however, was reasonable and did not contribute to reasonable suspicion. (R. p. 134, line 25 – p. 135, lines 1-17). The trial judge's finding that the officer had a reasonable articulable suspicion to justify

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[1] The third brake light was out, not the taillight.

the extended traffic stop and detention is not supported by the record and constitutes clear error requiring reversal.

During trial Petitioner renewed his objection to the admission of the dash cam video. (R. p. 168, lines 5-9). Petitioner also renewed the objection to the admission of the small amount of cocaine found on Petitioner's person. (R. p. 231, lines 23-24). Additionally, Petitioner renewed his objection to the bus ticket and the straw found on Petitioner's person. (R. p. 237, line 14 – p. 238, 239, 240, lines 1-10). Petitioner renewed his objection to the admission of the cocaine found in the car. (R. p. 232, line 15; p. 263, lines 22-25; p. 266, lines 1-18). Petitioner also renewed his objection to the admission of the Superior B cutting agent. (R. p. 236, lines 21-23). Petitioner renewed his objections to a post *Miranda* statement attributed to Petitioner. (R. p. 156, line 23 – p. 157, lines 1-6; p. 158, lines 16-18, p. 159, line 6, p. 240, lines 19-20). All evidence subject to the suppression motion was admitted over objection. The objections were again renewed at the close of the State's case and after the jury reached a verdict. (R. p. 278, lines 16-20; p. 346, lines 5-6).

"In Fourth Amendment cases, the trial court's factual rulings are reviewed under the 'clear error' standard." State v. Provet, 391 S.C. 494, 498, 706 S.E.2d 513, 515 (citing State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000)). "Under the clear error standard, an appellate court will not reverse a trial court's findings of fact simply because it would have decided the case differently." *Id.* (internal quotations omitted) (citing State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct.App.2005)). "Therefore, we will affirm if there is any evidence to support the trial court's rulings." Id. (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002)).

The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure. (U.S. Const. amend. IV). Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable per se. See Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. See United States v. Sullivan, 138 F.3d 126, 131 (4th Cir.1998). However, "[a]ny further *detention* for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime." *Id.* (emphasis added); see Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."). The initial pretextual traffic stop for the inoperable third brake light is not being challenged. The prolonged detention by Officer Hall after he wrote the warning ticket, however, required additional reasonable suspicion.

In State v. Moore, 415 S.C. 245, 252, 781 S.E.2d 897, 900–01, cert. denied, 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016) the South Carolina Supreme Court wrote:

> "Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop." Id. (citing Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)). "A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed." *Id.* (citing Arizona v. Johnson, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009)); see Rodriguez v. United States, ——U.S. ——, 135 S.Ct. 1609, 1616, 191 L.Ed.2d 492 (2015) (holding that even a *de minimis* extension of a traffic stop is unconstitutional absent reasonable suspicion). However, "[o]nce the underlying basis for the initial traffic stop has concluded, it does not automatically follow that any further detention for questioning is unconstitutional." Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. " '[T]he officer may detain the driver for questioning unrelated to the initial stop if

> he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring.' " *Id.* (quoting United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir.1998)).

Officer Hall's continued detention of Petitioner and Jones **after** checks on both of them came back clear and the officer wrote the warning ticket, exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment. At the time Officer Hall returned to the car the purpose of the traffic stop had been accomplished except for the issuance of the warning. Instead of issuing a warning the officer continued to question Petitioner and Jones and asked both to step out of the car. The officer still had Petitioner's license and there was another officer present on the scene. (R. p. 65, lines 9-12). A reasonable person in Petitioner's position would not have felt free to terminate the encounter. Officer Hall admitted that he never told them that they were free to leave. (R. p. 66, lines 20-25).

The prosecutor admitted that the traffic stop had been extended beyond the scope of the initial traffic stop for an inoperable third brake light but argued that the officer had an objectively reasonable and articulable suspicion illegal activity had occurred or was occurring. The prosecutor told the judge, "This traffic stop was extended based on a reasonable articulable suspicion." (R. p. 81, lines 20-21). Officer Hall, however, did not have an objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring, rendering the prolonged detention unconstitutional.

In State v. Provet, 391 S.C. 494, 500–01, 706 S.E.2d 513, 516 (Ct. App. 2011), this Court wrote:

> Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848 (citing United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir.1998)). Reasonable suspicion requires a particularized and objective basis that

> would lead one to suspect another of criminal activity. State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct.App.2001) (citing United States v. Cortez, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). In determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct.App.2007). Generally stated, reasonable suspicion is a standard that requires more than a "hunch" but less than probable cause. *Id.* Reasonable suspicion "is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." United States v. Foreman, 369 F.3d 776, 781 (4th Cir.2004). Therefore, courts must "consider the totality of the circumstances" and "give due weight to common sense judgments reached by officers in light of their experience and training." United States v. Perkins, 363 F.3d 317, 321 (4th Cir.2004). "Reasonableness is measured in objective terms by examining the totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." State v. Tindall, 388 S.C. 518, 527, 698 S.E.2d 203, 208 (2010).

"[I]n evaluating whether an officer possesses reasonable suspicion, this Court must "consider 'the totality of the circumstances—the whole picture.' " Sokolow, 490 U.S. at 8, 109 S.Ct. 1581 (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). State v. Moore, 415 S.C. 245, 253, 781 S.E.2d 897, 901, cert. denied, 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016).

The factors argued by the State in support of reasonable suspicion were: 1.) the purported vague suspicious activity observed by the narcotics officers at the bus station and generally relayed to Officer Hall; 2.) a lane change and forty-nine second delay in stopping to get across the bridge; 3.) the fact that the driver's zipper was undone; 4.) Petitioner's nervous behavior and delay in directly answering questions about where they were coming from; and 5.) the driver door opening during the traffic stop. The judge correctly found that the lane change and purported delay in stopping was reasonable. (R. p. 134, line 25 – p.135, lines 1-17). The judge incorrectly found that other non-specified factors provided Officer Hall with objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring. (R. p.

134, lines 14-24). Viewing the factors above as a whole and considering the totality of the circumstances the record does not support the trial judge's finding of reasonable suspicion. There is no evidence of reasonable suspicion in the present case.

In Moore the South Carolina Supreme Court found that the large amount of money found on Moore, Moore's unusual itinerary and Moore's nervousness supported the trial court's finding of reasonable suspicion. In regard to nervousness, the Court in Moore cautioned writing:

> Moore exhibited excessive nervousness in the judgment of the officer, which lends support to a finding of reasonable suspicion to prolong the traffic stop. We nevertheless comment on law enforcement's reliance on the seemingly omnipresent factor of nervousness. General nervousness will almost invariably be present in a traffic stop. At the suppression hearing, Deputy Owens gave a lengthy list of factors in support of reasonable suspicion, including many that were merely different manifestations of the element of nervousness. While nervous behavior is a pertinent factor in determining reasonable suspicion, we, like many appellate courts, have become weary with the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion. Here, law enforcement's penchant for turning nervousness into a laundry list of factors was not necessary. The trial court properly focused not on the factor of nervousness, but rather upon the facts noted above which support a finding of reasonable suspicion that Moore was likely engaged in criminal activity.

State v. Moore, 415 S.C. 245, 254–55, 781 S.E.2d 897, 902, cert. denied, 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016)(footnote #3 omitted). Nervousness alone is not sufficient and is simply one factor to be considered. In the present case there is no other evidence supporting a finding of reasonable suspicion. The purported vague suspicious activity observed by the narcotics officers at the bus station and generally relayed to Officer Hall, the fact that the driver's zipper was undone and the driver door opening during the traffic stop combined with Petitioner's nervous behavior does not support a finding of reasonable suspicion to justify the prolonged detention.

In Provet the South Carolina Court of Appeals affirmed the finding of reasonable suspicion by the trial court and wrote:

> In the case at hand, the trial court found reasonable suspicion existed to support Owens' further detention of Provet based on Owens ascertaining (1) Provet was nervous as displayed by extreme shaking of the hands and accelerated breathing, (2) third-party vehicle registration is very common in drug trafficking, (3) Provet's admission to visiting one girlfriend while driving a different girlfriend's vehicle, (4) Provet's claim he was coming from the Holiday Inn even though the traffic violation occurred prior to that hotel's exit, (5) Provet's presence in Greenville for two days without any luggage, (6) the presence of numerous fast food bags, a cell phone, and some receipts in Provet's vehicle, and (7) the presence of several air fresheners in the vehicle that produced a strong odor.

State v. Provet, 391 S.C. 494, 504–05, 706 S.E.2d 513, 518–19 (Ct. App. 2011), aff'd, 405 S.C. 101, 747 S.E.2d 453 (2013)(footnotes #3, #4 omitted). Unlike in Moore, Petitioner in the present case did not have a large amount of money or an unusual itinerary. Unlike in Provet, there was no evidence in the present case that Petitioner had extreme shaking of the hands or accelerated breathing. The vehicle in the present case was not registered to a third party. Petitioner did not provide false statements to Officer Hall. There was no testimony in the present case about fast food bags, or cell phones or several air fresheners.

In State v. Tindall, 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010)(footnotes #4, #5 omitted), the South Carolina Supreme Court wrote:

> The question therefore becomes whether the officer reasonably suspected a serious crime at the point at which he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket, instead opting to continue his questioning. *See Sullivan,* 138 F.3d at 131. At that point, the officer had ascertained the following information: (1) Tindall was driving to Durham to meet his brother; (2) Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous. We find these facts did not provide the officer with a "reasonable suspicion" that a serious crime was afoot. Consequently, the continued detention was illegal and the drugs discovered during the search of the vehicle must be suppressed.

In Tindall the South Carolina Supreme Court found that the officer lacked reasonable suspicion despite the third party rental and felony stretch. In the present case there was no third party

rental and no felony stretch. There was no evidence to support reasonable suspicion in the present case.

Any purported consent by either Jones or Petitioner was invalid because it was the result of the illegal detention. In State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005), the South Carolina Court of Appeals wrote:

> Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention. State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct.App.2002); see Wong Sun v. United States, 371 U.S. 471, 487–88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' ") (citation omitted); Brown v. State, 188 Ga.App. 184, 372 S.E.2d 514, 516 (1988) ("[I]n order to eliminate any taint from an [illegal] seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention.").
>
> Proof of a voluntary consent alone is not sufficient. Williams, 351 S.C. at 604, 571 S.E.2d at 710; Brown, 372 S.E.2d at 516. The relevant factors include the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.*

Any purported consent given by Jones or Petitioner was the product of the illegal detention and the taint of the unreasonable stop was not sufficiently attenuated. In State v. Williams, 351 S.C. 591, 604–05, 571 S.E.2d 703, 710–11 (Ct. App. 2002) the South Carolina Court of Appeals wrote:

> In the instant case, we need not determine whether Williams' consent was voluntary, because the record clearly reflects it was obtained through Blajszczak's exploitation of the unlawful detention. Blajszczak's testimony before the trial court revealed that a minimal amount of time passed between the seizure and ensuing consent, there were no intervening or attenuating circumstances, and, as we have already decided, Blajszczak's actions in detaining Barbour and Williams

> had no legal basis. Although the trial court failed to reach the issue of consent, the record unquestionably supports finding Williams' consent invalid.

In the present case, as in Williams, the record clearly reflects that consent was obtained through Officer Hall's exploitation of the unlawful detention. A minimal amount of time passed between the seizure and purported consent and there were no intervening circumstances. Any consent was invalid. The trial judge erred in refusing to suppress the fruits of the illegal seizure.

This Court does not need to reweigh the facts or substitute its de novo judgment in order to find that the State failed to prove reasonable suspicion because the record does not support the trial judge's finding of reasonable suspicion. The officer did not have reasonable suspicion to justify the prolonged traffic stop. The prolonged detention constituted an unconstitutional seizure under both the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. Any evidence obtained as a result of the unlawful seizure is fruit of the poisonous tree. Suppression of the evidence is the remedy. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The trial judge erred in refusing to suppress the evidence.

In affirming the conviction this Court wrote:

> Because we must evaluate the trial court's findings for clear error, we reluctantly conclude evidence supported the trial court's finding the officer had reasonable suspicion to extend the stop. See Moore, 415 S.C. at 251, 781 S.E.2d at 900 ("The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." (quoting Pichardo, 367 S.C. at 96, 623 S.E.2d at 846)); Wilson, 345 S.C. at 6, 545 S.E.2d at 829 ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court]'s ruling is supported by any evidence."). Here, Officer Hall testified that he had four years of experience in narcotics, had four years of patrol experience, and had conducted at least 1,000 traffic stops. He stated that at the time he initiated the stop, he knew Frasier had come from the bus station and narcotics officers had noticed something suspicious about him. Officer Hall testified that in his experience, people commonly used the bus system to bring narcotics into the community. He explained that when he first approached Jones's vehicle, her pants

> were fully unzipped and in his experience, people sometimes hid narcotics in their crotch area. Additionally, Officer Hall averred Frasier's level of nervousness was "a little more elevated" than what he normally saw during a traffic stop. Further, he stated Jones and Frasier evaded his questions about where they were coming from. Finally, he stated Jones's opening the driver's side door struck him as "a little odd" because it was an uncommon occurrence during traffic stops. Officer Hall stated that based on these observations, his "interest was piqued highly that something was amiss."

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *6 (S.C. Ct. App. July 29, 2020). Under a clear error standard of review this Court must review the record and determine if the trial judge's ruling is supported by the evidence. This review requires this Court to critically examine the factors offered in support of the finding of reasonable articulable suspicion, without reweighing the facts or substituting its de novo judgment. Pursuant to this clear error standard of review, however, this Court does not have to accept any explanation offered. Instead, this Court must determine if the facts offered support the ruling. In order to support a finding of reasonable articulable suspicion the facts should eliminate a substantial portion of innocent travelers and the officer must articulate why a particular behavior is suspicious or logically demonstrate that the behavior is likely to be determinative of illegal activity. See United States v. Williams, 808 F.3d 238, 251 (4th Cir. 2015).

Reviewing the record under a clear error standard of review, the trial judge's finding that the officer had a reasonable articulable suspicion to justify the extended traffic stop is not supported by the evidence, especially in light of the fact that the trial judge failed to make any specific findings of fact to support the ruling. The trial judge simply stated:

> Now, the officers have articulated many factors. And just in the interest of time, because the jury now has been waiting since 1:30 on us and it's now 2:12. It's not their fault. It took us a little bit longer. And I needed to give you all a reasonable chance to eat as well before we proceeded with the trial. But in the interest of time, I'm just going to cut to the chase on it, which is that the officers articulated what they believed to be the basis of a reasonable and articulable suspicion to

> extend the stop. And I find that testimony is reasonable and supported by the facts.

(R. p. 134, lines 14-24). This Court found the following factors supported the trial judge's finding that the officer had a reasonable articulable suspicion to justify the extended traffic stop: 1.) the officer's experience; 2.) the fact that narcotics officers noticed "something suspicious" about Petitioner at the bus station; 3.) the use of the bus system; 4.) the driver's unzipped pants; 5.) a "little more elevated" nervousness; 6.) evasiveness in answering questions about where they were coming from; and 7.) the driver door opening during the stop. These factors, taken together, do not support reasonable articulable suspicion that illegal activity had occurred or was occurring. The trial judge's general finding is not supported by the record.

The present case is easily distinguished from State v. Alston, 422 S.C. 270, 811 S.E.2d 747, (2018), where the South Carolina Supreme Court found that there was evidence in the record to support the trial judge's determination the officer had reasonable suspicion of criminal activity to extend the scope of the stop beyond its initial purpose. There is no such evidence in the present case. In United States v. Williams, 808 F.3d 238, 251 (4th Cir. 2015), cited in the Alston opinion, the Fourth Circuit Court of Appeals wrote:

> As explained above, each of the factors relied on in the Superseding Opinion—standing alone—fails to support any reasonable, articulable suspicion of criminal activity. That analysis does not end our inquiry, however, because, as we have recognized, "reasonable suspicion may exist even if each fact standing alone is susceptible to an innocent explanation." *See* McCoy, 513 F.3d at 413–14. Under the applicable standard, the facts, "in their totality," should "eliminate a substantial portion of innocent travelers." Id. at 413. Furthermore, an officer must "either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." *See* Foster, 634 F.3d at 248.

As to the first factor considered by this Court, while the Courts must give due weight to an officer's experience, the officer must still articulate why a certain behavior is indicative of illegal

activity. See United States v. Williams id. The second factor, the fact that narcotics officers noticed "something suspicious" about Petitioner at the bus station is a factor the Court can consider, but without more does not rise to the level of reasonable suspicion. As to the third factor, use of the bus system, reasonable suspicion should not be based on the use of the bus system because this factor fails to eliminate a substantial portion of innocent travelers who use the bus system. See United States v. Williams id. As to the fourth factor, the driver's unzipped pants, the trial judge stated, "And you can see her attitude to the video. Like, I just got out of the shower, why is it your business that my zipper is down, which I don't know is necessarily unreasonable." (R. p. 96, line 23 – p. 97, line 1). As to the fifth factor, a "little more elevated" nervousness, "General nervousness will almost invariably be present in a traffic stop." Moore, 415 S.C. at 254-255, 781 S.E.2d at 902.

As to the sixth factor, purported evasiveness, Officer Hall testified at the pretrial hearing, "Just with the totality of everything, with what I was relayed from the detectives and almost evasiveness – well, not evasiveness, but the length they pulled over, her zipper being undone, just not being very direct with their answers with me, my interested was piqued highly that something was amiss or – I don't know." (R. p. 45, lines 2-7). The officer admitted, however, that neither Jones nor the Petitioner provided false or conflicting statements. (R. p. 59, lines 8-23). Officer Hall agreed that within the first two minutes of the stop Petitioner told the officer he was coming from New York and Jones told the officer she was coming from the bus station. (R. p. 59, lines 8-15). At that point in time, the officer had no reason to believe that this was not true.

As to the seventh and final factor considered by this Court, the driver door opening during the stop, while the officer testified this was unusual, he failed to articulate how this behavior was indicative of illegal behavior. In the opinion this Court wrote:

> Although we acknowledge that several of these factors would likely be insufficient standing alone to support a finding of reasonable suspicion, they must be viewed under the totality of the circumstances. See Moore, 415 S.C. at 253, 781 S.E.2d at 901 (acknowledging "many of the factors offered by the State seem innocent when viewed in isolation," but finding there was "evidence to support the trial court's finding of reasonable suspicion to prolong the traffic stop given the totality of the surrounding circumstances"); Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (recognizing that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). Officer Hall's testimony linked the foregoing observations to the knowledge he gained from his experience in law enforcement to explain why Jones's and Frasier's behaviors caused him concern. Therefore, in view of the totality of the circumstances, we find Officer Hall's testimony supports the trial court's finding that the decision to further detain Jones and Frasier was based on reasonable articulable suspicion.

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *7 (S.C. Ct. App. July 29, 2020). The seven factors considered by this Court, as discussed above, do not support the finding that the officer had a reasonable articulable suspicion of criminal activity to support the extended traffic stop.

2. The trial judge erred in refusing to suppress a bus ticket, a straw and a small bag of cocaine found on Petitioner's person as a result of a nonconsensual search conducted without probable cause.

Without conceding that any purported consent to search was the result of an unlawful detention and therefore invalid, as argued in issue one, Petitioner additionally and alternatively argued that Officer Hall's search of Petitioner was not consensual. Prior to trial Petitioner filed

a written motion to suppress and moved to suppress a small amount of cocaine, a straw and a bus ticket found on Petitioner's person by Officer Hall as a violation of the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. (R. p. 94, line 4 – p. 95, 196, lines 1-16 ; p. 104, 105, 106, 107, lines 1-7; R. p. 356). The trial judge found the search to be consensual. (R. p. 128, line 5 – p. 129, 130, 131 lines 1-8). The trial judge erred. At trial Petitioner renewed the objection to the admission of the small amount of cocaine found on Petitioner's person. (R. p. 231, lines 23-24). Additionally, Petitioner renewed his objection to the bus ticket and the straw found on Petitioner's person. (R. p. 237, line 14 – p. 238, 239, 240, lines 1-10). The renewed objections were overruled. (R. p. 239, lines 14-15).

During the pre-trial motion to suppress Officer Hall testified that he asked Petitioner "if he minded if I checked him out or searched him, and he said, 'I do, but', and just kind of put his hands on top of the car." (R. p. 46, lines 23-25). The interaction between Officer Hall and Petitioner can be seen on the video that was introduced in evidence as State's Exhibit #6. Officer Hall searched Petitioner and found a small bag containing cocaine, a straw and a bus ticket. (R. p. 232, lines 1-3; p. 237, line 11 – p. 238, 239, 240 lines 1-2). Officer Hall admitted that his request to search was more of a statement. (R. p. 70, lines 2-5). Counsel for Petitioner questioned Officer Hall:

> Q. That seems to me like this is consent military style. You told him, you don't mind if I search you real quick, it's like you are going to do it anyway. And maybe that's what he's thinking, yeah, I mind, but what choice do I have. Right? You don't think you had maybe some duty to ask him follow-up question or at least get a yes from him?
>
> A. Yes, in hindsight, I could have worded it better or made the question a little bit more clear towards him.

(R. p. 72, lines 1-8). Officer Hall admitted that he and the other officer on scene were armed with a pistol, a stun gun, pepper spray and a baton. (R. p. 68, lines 3-19). Officer Hall admitted that Petitioner asked, "My pockets too?" (R. p. 72, lines 14-19).

Counsel for Petitioner argued:

> If anything, he's revoked his consent at that point. Even if he did consent in the beginning, once they start going in his pockets, he's protesting that and revoking any consent that I don't think he gave in the first place. I think it's a submission to authority and not a voluntary consent. The case I cite to is State v. Harris. In that case, the police wanted to search a guy's car, and said, we want to search your car, and the guy said, that's cool. And the court ruled that's not a voluntary consent. He said, that's cool.

(R. p. 104, line 21 – p. 105, lines 1-5). The State admitted that the voluntariness of the consent to search was a close call telling the trial judge, "He then asked for consent to search, pulls the defendant out, and asks for his consent to search. Now, I have a duty to the Court. That is a close call on the consent to search his person where the cocaine is found." (R. p. 86, lines 4-7). The State agreed that the search of Petitioner's person was not a Terry frisk. (R. p. 86, line 9 – p. 87, lines 1-12).

During argument during the pre-trial suppression hearing the trial judge noted, "Now, I will conceded the video, I've watched it, and his behavior is sort of contradictory. He says, I really don't want to, but then his body language contradicts his words. Because then he immediately turns around and puts his hands on the roof of the car and basically submits to his person being searched. He said, I really don't want to, but. It's kind of what his body says." (R. p. 94, lines 11-17). A begrudging submission is not consent. The search of Petitioner's person was unlawful as nonconsensual.

In State v. Harris, 277 S.C. 274, 276, 286 S.E.2d 137, 138 (1982), the case cited by counsel for Petitioner, the South Carolina Supreme Court, finding the search nonconsensual, wrote:

> Consent is recognized as an exception to the general rule that searches conducted without a warrant are unreasonable. State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). However, the State bears the burden of proving the voluntariness of a consent to search from the totality of the surrounding circumstances. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977). Also, the determination of voluntariness of consent is a question of fact for the trial judge. State v. Bailey, S.C., 274 S.E.2d 913 (1981). The trial judge determined that in view of the surrounding circumstances, "That's cool" did not constitute a consent to search. We agree. "That's cool" as a response to a declaration that the police officer wanted to search the vehicle at the complex was not a voluntary consent.

As argued during the suppression hearing, Petitioner's statement, after being asked if he minded if the Officer searched him, that "he did mind, but . . ." is a stronger demonstration of non-consent than the "that's cool" statement found in Harris to be nonconsensual. (R. p. 106, line 19 – p. 107, lines 1-2).

In United States v. Robertson, 736 F.3d 677, 679–80 (4th Cir. 2013), the Fourth Circuit discussed the difference between "a voluntary consent to a request versus a begrudging submission to a command" finding that when Robertson walked toward the officer and raised his hands, after being silent in response to the request to search, he was merely submitting to a search rather than voluntarily consenting to the search. The Fourth Circuit wrote:

> The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. Searches without probable cause are presumptively unreasonable, but if an individual consents to a search, probable cause is unnecessary. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). We review for clear error a district court's determination that a search is consensual under the Fourth Amendment. See United States v. Wilson, 895 F.2d 168, 170 (4th Cir.1990). We apply a subjective test to analyze whether consent was given, looking to the totality of the circumstances. Wilson, 895 F.2d at 171–72. The government has the burden of

> proving consent. See United States v. Mendenhall, 446 U.S. 544, 557, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Relevant factors include the officer's conduct, the number of officers present, the time of the encounter, and characteristics of the individual who was searched, such as age and education. Lattimore, 87 F.3d at 650. Whether the individual searched was informed of his right to decline the search is a "highly relevant" factor. Wilson, 895 F.2d at 172.

Robertson, 736 F.3d at 679–80.

In the present case, Petitioner's statement, after being asked if he minded if the Officer searched him, that "he did mind, but . . ." was a stronger demonstration of non-consent than Robertson's silence. Petitioner's action of placing his hands on the car demonstrated that he was merely submitting to the search, as in Robertson, rather than voluntarily consenting to the search. Viewing the relevant factors of proving consent, as discussed in Robertson, Petitioner was stopped on the side of the road and was not free to leave. He was surrounded by two armed uniformed officers and was not informed of his right to decline the search. Like the search in Robertson, the search in the present case was nonconsensual. The evidence found on Petitioner's person pursuant to the unlawful search must be suppressed.

In affirming this Court wrote:

> We find evidence supports the trial court's finding that Frasier consented to the search of his person. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court']s ruling is supported by any evidence."). Here, Frasier can be seen and heard in the video stating, "I do, but" when the officer asked if he minded if he "checked" him and then he turned around and placed his hands on top of the vehicle. When the officer began to search his pockets, Frasier stated, "my pockets too?" but did not tell the officers to stop or otherwise revoke his consent. Additionally, Officer Hall testified that even though Frasier said he "mind[ed]," he then turned around and placed his hands on the vehicle, which Officer Hall perceived as permission. Further, he stated Frasier never said "stop" or "stop doing that." Finally, the record contains no evidence officers used or threatened the use of force to coerce Frasier to consent. The trial court found that according to the video, notwithstanding Frasier's statements, "his body language [wa]s clearly consensual" and he "very clearly, by his behavior, in a noncoerced way, turn[ed] and put[ ] his hands on the vehicle and consent[ed]" to the search. The trial court stated it could not speculate as to Frasier's inner

> thoughts but found he did not revoke his consent by stating "even my pockets too?" because this was not an unequivocal act or statement revoking consent. We find Frasier's conduct depicted in the video as well as Officer Hall's testimony support a conclusion that, by Frasier's words and conduct, he voluntarily consented to the search and did not effectively withdraw that consent at any point during the search. Accordingly, we find the trial court did not err by concluding Frasier consented to the search, and we affirm its denial of his motion to suppress.

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *7 (S.C. Ct. App. July 29, 2020). Viewing the totality of the circumstances, as discussed above, the record does not support the trial judge's finding that the consent to search was voluntary.

3. The trial judge erred in refusing to suppress Petitioner's statements to police when the statements were involuntary and in violation of the rule established in Missouri v. Seibert, 542 U.S. 600 (2004).

Without conceding the argument presented in issue one that statements made as a result of the unlawful prolonged detention should have been suppressed, Petitioner additionally and alternatively argued that the statements were involuntary and in violation of Missouri v. Seibert, 542 U.S. 600 (2004). Prior to *Miranda* warnings, but after Petitioner was placed in custody, Officer Hall questioned Petitioner about the jacket where the cocaine was found. (R. p. 49, lines 12-19). Officer Hall testified that Petitioner stated that the jacket was his. (R. p. 49, lines 20-21). Eight minutes later, Officer Hall advised Petitioner of his *Miranda* rights. (R. p. 76, lines 7-11). Officer Hall again asked Petitioner about the jacket found in the car. (R. p. 76, lines 15-19). According to Officer Hall Petitioner again stated that the jacket was his. (R. p. 241, lines 6-8). Officer Pritchard, one of the narcotics officers who arrived at the stop later, also asked Petitioner, post *Miranda* warnings, about the cocaine found in the jacket in the car. According to the officer, Petitioner responded, "I'm responsible." (R. p. 159, lines 19-21).

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Prior to trial Petitioner filed a written motion to suppress and moved to suppress statements attributed to Petitioner as both involuntary and in violation of Missouri v. Seibert, 542 U.S. 600 (2004). (R. pp. 107 – 114, R. p. 358). During the suppression hearing Officer Hall testified that he should have mirandized Petitioner when he placed him under arrest for the powder substance found on his person. (R. p. 47, line 16 – p. 48, lines 1-11). The judge suppressed pre *Miranda* statements provided to Officer Hall but admitted the post *Miranda* statements provided to Officer Hall and Officer Pritchard. (R. p. 125, line 18 – p. 126, 127, 128, lines 1-4). The trial judge erred. At trial Petitioner renewed his objections to the post *Miranda* statements attributed to Petitioner. (R. p. 156, line 23 – p. 157, lines 1-6; p. 158, lines 16-18, p. 159, line 6, p. 240, lines 19-20).

In State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841–42 (2010), the South Carolina Supreme Court wrote:

> In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:
>
> 1) the completeness and detail of the question and answers in the first round of interrogation;
>
> 2) the timing and setting of the first questioning and the second;
>
> 3) the continuity of police personnel; and
>
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

In State v. Hill, 425 S.C. 374, 384–85, 822 S.E.2d 344, 350 (Ct. App. 2018), this Court wrote:

> Navy made clear Seibert did not rest on whether the police deliberately used the "question first" tactic. Navy, 386 S.C. at 304, 688 S.E.2d at 842. Here, there is no direct evidence the Investigators set out to skirt *Miranda*, and it would be naïve to think we would find some. Seibert, 542 U.S. at 616 n. 6, 124 S.Ct. 2601 (noting evidence of intent will rarely surface, "so the focus is on facts apart from intent that show the question-first practice at work"). However, this is not a situation like Oregon v. Elstad, 470 U.S. 298, 301, 312-13, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), where a defendant's unwarned inculpatory statement—uttered in response to an arresting officer's offhand comment that he "felt" the defendant was involved in a burglary—did not render later *Miranda* warnings given to the defendant at the station ineffective. Here, we do not have a *Miranda* mistake made in the heat of arrest but a calculated investigatory interview structured by veteran homicide investigators who at times pitched Hill doubletalk. Justice Kennedy's concurrence in Seibert ventured such a *Miranda* breach could be cured if there was a substantial break in the time and environment of the first and second interviews, or if the defendant was advised his first confession could not be used against him. Seibert, 542 U.S. at 622, 124 S.Ct. 2601. Neither occurred here.

In the present case Officer Hall, after Petitioner was arrested for the powder substance found on his person and after Officer Hall found the cocaine in a jacket in the backseat but before *Miranda* warnings, asked Petitioner about ownership of the jacket. The judge suppressed Petitioner's initial answer that the jacket belonged to him. Eight minutes later Officer Hall mirandized Petitioner and again asked him about ownership of the jacket. The trial judge admitted Petitioner's second answers to both Officers Hall and Pritchard that the jacket belonged to him. While the questioning in regard to ownership of the jacket was not lengthy, the second post-*Miranda* questioning was within eight minutes of the first pre-*Miranda* questioning, Officer Hall conducted both interrogations and treated the second round of questioning as a continuation of the first. Petitioner was not warned that his first statement could be used against him. During the suppression hearing the following questioning of Officer Hall took place:

Q. And after he's read his Miranda, you begin questioning him again, right –

A. Yes, sir.

> Q. –about the jacket. And you really don't – you don't kind of start off fresh like, okay, whose jacket is it, right? You say, you are telling me the jacket is yours. That's the first thing you say after Miranda; is that right?
>
> A. That sounds correct.
>
> Q. Basically, referring back to that statement that he made eight minutes ago?
>
> A. I believe so, yes.

(R. p. 76, lines 12-22). The "question first, give *Miranda* warnings later" tactic used by Officer Hall is precisely what the Courts found to be a violation in Seibert and Navy. The statements made by Petitioner after the second round of questioning should have been suppressed. The trial judge's failure to suppress the statements was not harmless. Petitioner admitted ownership of a jacket containing over 100 grams of cocaine.

Petitioner correctly distinguished State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016). (R. p. 110, line 19 – p. 111, lines 1-8). In Medley the second round of statements were not the result of a second interrogation, as in the present case, but rather initiated by the defendant. Petitioner Frasier did not initiate the second round of statements. The statements were taken in violation of the rule announced in Seibert and discussed in Navy.

Petitioner also challenged admission of his statement claiming ownership of the jacket as involuntary because it was made after a veiled threat to arrest Ms. Jones. Petitioner argued:

> The next argument, which is voluntariness, the second before he claims the jacket, Officer Hall says, put her in cuffs. And puts Jones in cuffs. She's got a little toddler with her. He's already in cuffs. So he says, put her in cuffs. Asks whose jacket it is. Mr. Frasier claims the jacket, seeing her in cuffs. Officer Hall tells him, she's just being detained. She's not under arrest. Implication being, I can let her go if you tell me the right thing. And that's when he claimed the jacket.

(R. p. 112, line 20 – p. 113, lines 1-4). Petitioner cited State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), to support the argument that the statement was inadmissible as involuntary. (R. p. 113, lines 23 – p. 114, lines 1-17).

In Corns the South Carolina Court of Appeals reversed the trial court's admission of confession which was the result of veiled threats against the defendant's family. The Court wrote:

> A reading of the record as a whole with special consideration of the testimony of the officers who witnessed the oral statements leads us to the conclusion that, at the very least, the officers coerced Corns's confession on the marijuana by means of veiled threats against his family. When a defendant waives his *Miranda* rights and gives a statement, the burden is on the State to prove his rights were voluntarily waived by a preponderance of the evidence. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused. Id. 382 S.E.2d at 914. A confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). We find that the testimony of the officers conceding they informed Corns his wife could be arrested, that she could be "involved in the marijuana," and that their children could be taken from them amounted to an exertion of improper influence rendering Corns's statement involuntary. Accordingly, we find the trial judge erred as a matter of law in allowing Corns's oral statements into evidence.

State v. Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992). Viewing the totality of the circumstances in the present case, the State failed to prove, by a preponderance of the evidence, that Petitioner voluntarily waived his *Miranda* rights. The statements should have been suppressed.

In affirming the conviction this Court wrote:

> We find Officer Hall's testimony and the contents of the video support the trial court's finding that, based on the totality of the circumstances, Frasier's postwarning statement, in which he admitted to owning the jacket, was voluntary notwithstanding Officer Hall's pre-warning questioning. *See* Rochester, 301 S.C. at 200, 391 S.E.2d at 247 ("On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion.").

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *8 (S.C. Ct. App. July 29, 2020). This Court additionally wrote:

> Further, we find evidence supports the trial court's rejection of Frasier's argument he claimed ownership of the jacket because he felt threatened officers would arrest Jones. Although the burden was upon the State to prove voluntariness, Frasier provided no testimony he felt coerced or threatened by the fact officers had placed Jones in handcuffs. The video recording shows Officer Hall made no express threat to arrest Jones if Frasier did not confess. Therefore, the trial court did not err by refusing to exclude the statement on this basis.

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *9 (S.C. Ct. App. July 29, 2020).

Counsel respectfully submits that this Court, in finding that Petitioner's post- *Miranda* warning statement that the jacket containing drugs belonged to him was voluntarily made, overlooked the fact that Petitioner was not warned that his pre-*Miranda* warning statement could not be used against him. Additionally, counsel respectfully submits that this Court shifted the burden of proof in finding that Petitioner provided no testimony he felt coerced or threatened by the fact that prior to the statement officers placed his common law wife in handcuffs in the presence of a toddler. The failure to suppress the post-*Miranda* statement constituted an abuse of discretion.

Based on the above arguments counsel respectfully seeks rehearing.

Respectfully Submitted,

Kathrine H. Hudgins

KATHRINE H. HUDGINS
Appellate Defender

This 13th day of August, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

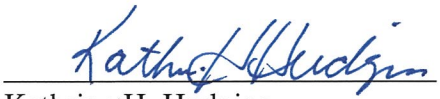
V.

MICHAEL N. FRASIER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Michael N. Frasier, #215880, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 13th day of August, 2020.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

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August 18, 2020

Ms. Kathrine Haggard Hudgins, Esquire
1330 Lady St., Ste.401
Columbia SC 29201

Re: The State v. Michael Frasier, Jr.
Appellate Case No. 2017-000802

Dear Counsel:

This will acknowledge receipt of your Petition for Rehearing.

By copy of this letter, opposing counsel is requested to file an original return to this motion no later than ten (10) days from the date of this letter.

Very truly yours,

V Claire Allen

CLERK

cc: Alan McCrory Wilson, Esquire
Mark Reynolds Farthing, Esquire
Scarlett Anne Wilson, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2017-000802

THE STATE,

Respondent,

vs.

MICHAEL N. FRASIER, JR.,

Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On July 29, 2020, this Court issued a published opinion in which it unanimously affirmed Appellant Michael N. Frasier, Jr.'s conviction for trafficking in cocaine. State v. Frasier, Op. No. 5751 (S.C. Ct. App. filed July 29, 2020). In affirming Frasier's conviction, this Court properly followed the applicable standard of review and correctly concluded the trial judge's ruling regarding the propriety of the extension of the stop was supported by the evidence presented. Likewise, this Court correctly found the trial judge's ruling finding Frasier voluntarily consented to the search of his person was supported by the evidence presented. Finally, this Court again properly followed the applicable standard of review and correctly found the trial judge's conclusion regarding the voluntary nature of Frasier's post-warning statements was supported by the evidence presented.

Even though this Court accurately applied the pertinent standards of review to each of the issues raised and correctly examined the evidence and testimony contained in the record before

concluding the trial judge's rulings were properly supported by it, Frasier has now submitted a lengthy Petition for Rehearing challenging this Court's rulings on all three appellate issues raised. Through that petition, Frasier has largely repeated the arguments contained in his appellate brief in a strikingly-similar manner to the manner in which they were originally presented while adding only a brief amount of additional analysis that essentially just reiterates those previously-raised—and rejected—arguments. On August 18, 2020, this Court requested the State file a return to Frasier's petition.

Looking to Frasier's contentions in his Petition for Rehearing as to the issue regarding the propriety of the extension of the stop, they can best be summarized as a simple claim the factors found by the trial judge to support reasonable suspicion did not actually do so. In making that claim, Frasier in essence seeks to elevate the low bar of the reasonable suspicion standard to something much more demanding than it actually is in an effort to have the officer's actions deemed unconstitutional. See Kansas v. Glover, __ U.S. __, 140 S. Ct. 1183, 1190 (2020) (rejecting an interpretation of what is required to satisfy the reasonable suspicion standard because the rejected interpretation "would considerably narrow the daylight between the showing required for probable cause and the 'less stringent' showing required for reasonable suspicion"); Kaley v. United States, 571 U.S. 320, 338 (2014) (recognizing even the higher probable cause standard "is not a high bar"). Likewise, Frasier seems to urge the application of a totality-of-the-circumstances analysis that would incorrectly involve consideration of each individual factor alone to determine whether it alone supports reasonable suspicion and that would preclude a factor from being considered towards the reasonable suspicion determination if it could potentially be explained as innocent behavior when improperly considered in an isolated and out-of-context manner. See United States v. Arvizu, 534 U.S. 266, 273 (2002) (instructing

courts are precluded from conducting a "divide-and-conquer analysis" when considering the totality of the circumstances). However, as this Court recognized, the appropriate analysis involves an examination of all the circumstances viewed together as a whole while reasonable suspicion can exist even when each of the factors alone might appear to be innocent or might not have been sufficient to establish reasonable suspicion by itself. Id.; see United States v. Sokolow, 490 U.S. 1, 10 (1989) (instructing innocent behavior will frequently provide the basis for a showing of both probable cause and reasonable suspicion). When the correct analysis is applied to the factors present in Frasier's case, the officer—just as the trial judge correctly found—possessed sufficient information to satisfy the low bar of the reasonable suspicion standard and, therefore, acted in a constitutionally reasonable manner when he extended the stop. Cf. Terry v. Ohio, 392 U.S. 1, 28 (1968) (holding an officer's actions, which were based on the officer observing Terry and his confederate simply walk by and look in a store window several times, in effectuating a detention and frisk search were constitutionally reasonable because they were not "the product of a volatile or inventive imagination" or "undertaken simply as an act of harassment" and, instead, were reasonably tempered). Therefore, this Court—which applied the correct standard of review and conducted the appropriate totality-of-the-circumstances analysis—properly affirmed the trial judge's ruling finding the extension of the stop was supported by reasonable suspicion. Accordingly, for those reasons coupled with the reasons already more thoroughly articulated in the State's appellate brief and during oral argument, this Court should decline to grant rehearing in Frasier's case.

Next, looking to Frasier's rehearing contentions as to the issue regarding the propriety of the search of his person, they do not substantively deviate from the arguments already raised in Frasier's appellate brief. Instead, in arguing against this Court's affirmance of the trial judge's

ruling on the search issue, Frasier simply repeats the arguments from his brief in a nearly-verbatim fashion, quotes a portion of this Court's opinion addressing the matter, and includes the following statement after the quotation: "Viewing the totality of the circumstances, as discussed above, the record does not support the trial judge's finding that the consent to search was voluntary." Based on the fact Frasier's rehearing arguments on the search issue have not substantively changed from the arguments previously raised to this Court, the State does not have any new responses to them. Therefore, the State relies upon the arguments previously raised in its appellate brief and during oral argument before this Court. Moreover, since this Court's ruling on appeal fully comports with the relevant law, this Court correctly found the trial judge did not err by concluding Frasier consented to the search based on the evidence and testimony presented. See State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 856 (2003) ("A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion."); cf. United States v. Vongxay, 594 F.3d 1111, 1120 (9th Cir. 2010) (affirming the district court judge's finding Vongxay impliedly consented to a search of his person where an officer asked Vongxay for permission to search him and Vongxay responded by raising his hands to his head so as to enable a search); Chism v. State, 312 Ark. 559, 569, 853 S.W.2d 255, 261 (Ark. 1993) (finding Chism's act of assuming a search position constituted "overwhelming evidence of [Chism]'s consent to search"). Accordingly, for the identified reasons, this Court should again decline to grant rehearing in Frasier's case.

Finally, looking to Frasier's rehearing contentions as to the issue regarding the admissibility of his statements, they again have not been changed in a substantive way from the arguments already raised in Frasier's appellate brief. Once again, Frasier simply repeats the

arguments from his brief in a virtually-identical fashion, includes a single reference to a case not previously cited, quotes a portion of this Court's opinion addressing the admissibility of the post-warning statements, and includes a few additional lines of arguments. Through those extra lines, Frasier alleges rehearing is warranted because: (1) this Court purportedly overlooked the fact he was not warned his pre-warning statement could not be used against him prior to giving his post-warning statements; and (2) this Court supposedly shifted the burden of proof to him by finding he did not provide testimony to support a conclusion he felt coerced or threatened by his common-law wife being handcuffed in the presence of a toddler. To the extent Frasier's rehearing arguments repeat ones already raised, the State once again relies upon the arguments previously raised in its appellate brief and during oral argument before this Court as support for the conclusion the trial judge's ruling regarding the admissibility of the post-warning statements was a correct one. See State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (recognizing a trial judge's ruling regarding the voluntariness of a statement will be affirmed on appeal if supported by *any* evidence). Meanwhile, to the extent Frasier contends this Court erred by overlooking the fact he was not expressly warned his pre-warning statement could not be used against him prior to making his post-warning statements, the absence of such a warning in no way required Frasier's post-warning statements to be deemed involuntary. See Oregon v. Elstad, 470 U.S. 298, 314 (1985) ("[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to

waive or invoke his rights."); see also Missouri v. Seibert, 542 U.S. 600, 617 (2004) (plurality opinion) (holding the use of a deliberate "question first and warn later" tactic precludes the admission of a subsequent post-warning statement unless the facts support a conclusion the warnings given could have been effective); Seibert, 542 U.S. at 622 (Kennedy, J., concurring) ("The admissibility of postwarning statements should continue to be governed by the principles of Elstad unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made."). Furthermore, to the extent Frasier contends this Court—despite expressly recognizing the State had the burden of establishing the voluntariness of the statements—shifted the burden of proof by noting no testimony was presented establishing Frasier felt threatened or coerced, Frasier's assertion in that regard ignores the fact an absence of conflicting or disputed evidence regarding the voluntariness of a statement can legitimately be considered by a court analyzing an issue regarding the voluntariness of the statement, and such consideration in no way shifts the burden of proof away from the State. Cf. State v. McCray, 332 S.C. 536, 549, 506 S.E.2d 301, 307 (1998) (affirming the trial judge's voluntariness determination regarding McCray's statement due—in part—to the fact "[t]here is no evidence [McCray] was coerced into making a statement"); State v. Breeze, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (Ct. App. 2008) ("Conversely, Breeze did not contradict [the officer]'s testimony with respect to the issue of whether the statement was voluntary. . . . Faced with [the officer]'s undisputed testimony the trial court concluded the State had showed that Breeze voluntarily made the statement. Based on [the officer]'s testimony, we cannot conclude the trial court's ruling is unsupported by any

evidence."). Accordingly, for all the reasons advanced so far, this Court should once again decline to grant rehearing in Frasier's case.

Furthermore, even if this Court's conclusion regarding the admissibility of Frasier's post-warning statements was somehow erroneous, any error resulting from the admission of the statements in Frasier's case—which would not have been transformed into a "whodunit"-style mystery if the statements had been excluded due to the fact Frasier, who was the only male occupant of the vehicle at the time of the stop, was caught with cocaine on his person packaged in the exact same type of green baggie in which the cocaine recovered from the men's jacket was packaged—would have been harmless beyond a reasonable doubt in light of the insignificance and immateriality of those statements when they are considered in conjunction with the other overwhelming evidence of Frasier's guilt presented during trial. Cf. State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621-622 (1997) ("[A]ny error in the failure to suppress his statements was harmless beyond a reasonable doubt. . . . The overwhelming evidence of Easler's guilt renders any Miranda violation harmless."), overruled on other grounds by State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018); State v. White, 410 S.C. 56, 60, 762 S.E.2d 726, 728 (Ct. App. 2014) (finding any error in the trial judge's failure to suppress White's statement placing White at the scene of a murder as the product of impermissible "question first and warn later" questioning was harmless beyond a reasonable doubt because, "notwithstanding White's statement, cell phone evidence clearly placed [the victim] and White together at the time and place of the murder" and further finding any error to be harmless in light of the witness testimony linking White to the murder). Significantly, the fact any possible error regarding the admission of Frasier's post-warning statements would have been completely harmless under the

circumstances involved further demonstrates there is no legitimate need for rehearing in Frasier's case.

In light of all the foregoing reasons coupled with the arguments raised in both the State's appellate brief and during oral argument before this Court, this Court correctly affirmed all the appropriate and factually-supported rulings made by the trial judge during Frasier's trial. Therefore, no legitimate grounds exist warranting a grant of rehearing in Frasier's case. Frasier's Petition for Rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

By: _____
Mark R. Farthing
S.C. Bar Number 76901

September 2, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2017-000802

THE STATE,

Respondent,

vs.

MICHAEL N. FRASIER, JR.,

Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Return to Appellant's Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 2nd day of September, 2020.

MARK R. FARTHING
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

The State, Respondent,

v.

Michael N. Frasier, Jr., Appellant.

Appellate Case No. 2017-000802

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Lockemy C.J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Kathrine Haggard Hudgins, Esquire
Mark Reynolds Farthing, Esquire
Scarlett Anne Wilson, Esquire

FILED
September 21, 2020